No. 80-446

In The

Supreme Court of the United States

October Term, 1980

UNION PACIFIC RAILROAD COMPANY,
A Corporation,
Petitioner,

vs.

DONALD D. FLETCHER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Pages
Statement	1
Opinions Below	2
Reasons Why the Writ Should Be Denied	2
Statement of Facts	2
Conclusion	11

TABLE OF AUTHORITIES

CASES

Burnett v. New York Central Railway, 380 U. S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965) 4

Fletcher v. Union Pacific Railroad, 467 F. Supp. 61 (1979 D. C. Neb.), 621 F. 2d 902 (8th Cir. 1980) 2

Fowkes v. Pennsylvania RR Co., 264 F. 2d 397 (3rd Cir. 1959) 2, 3

TEXT

53 Am. Jur. 2d, *Master and Servant,* section 357 4

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STATEMENT

Respondent Donald D. Fletcher respectfully requests that the petition of Union Pacific Railroad for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 621 F. 2d 902. The statement in petitioner's brief that the opinion by the Honorable A. G. Schatz, United States District Judge for the District of Nebraska was not reported is incorrect. The citation to the District Court's opinion is *Fletcher v. Union Pacific Railroad,* 467 F. Supp. 61 (1979 D. C. Neb.)

———o———

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals for the Eighth Circuit was correct in its determination that respondent Fletcher's claim against his employer Union Pacific Railroad for work connected disability was timely filed, because the railroad's tortious conduct did not cease until Fletcher was assigned to lighter work. This case is directly in accord with the holding and opinion in Fowkes v. Pennsylvania RR Co., 264 F. 2d 397 (3rd Cir. 1959).

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STATEMENT OF FACTS

The opinion by the Eighth Circuit Court of Appeals with regard to the statute of limitations issue was based on a holding that the railroad's assignment of Fletcher to work more strenuous than that for which he was reasonably suited was not barred by limitations, because the tortious

conduct did not cease until the employer assigned the employee to do lighter work.

The reassignment to lighter work was not made until April 16, 1975. In support of its position, the court cited the case of *Fowkes v. Pennsylvania Railroad Co.*, 264 F. 2d 397 (3rd Cir. 1959). This case is discussed in the petition for certiorari and we respectfully disagree with the petitioner's analysis of the Fowkes' case.

The Fowkes' case held that a railroad boilermaker's suit under the Federal Employers' Liability Act was timely where from 1924 until September 9, 1952 Fowkes used a large air hammer to cut stay bolts. Sometimes the accumulation of water in the airlines leading to the hammer caused the hammer to stop suddenly. The sudden stop in the hammer caused a severe jolting and Fowkes developed pain in his shoulders which was diagnosed as traumatic arthritis. Thereafter, Fowkes bid for lighter work which he did not receive until August 31, 1952 although his symptoms of pain and disability existed throughout the many years that he operated the air hammer.

In affirming a judgment against the railroad, the Court of Appeals for the Third Circuit rejected the railroad's arguments that:

> "1. The cause of action necessarily accrued during the extended period *before* August 31, 1952, where the boilermaker was suffering damaging jolts and experiencing pain therefrom.
>
> "2. The action was timely only as to the aggravation of his condition between August 31, 1952 and September 9, 1952 when the injurious work was terminated."

The court said that since the boilermaker never suffered a single serious injury, the statute of limitations did not begin to run until the boilermaker was relieved of work with the heavy hammer on September 10, 1952.

The record in this case is clear that Fletcher was not released from section hand work until April 16, 1975.

In 53 Am. Jur. 2d, *Master and Servant,* section 357, the authors state:

> ". . . other authorities hold that the statute of limitations begins to run from the time of the employer's negligence in exposing the employee to the disease which injures him, or that the statute runs from some other period, *such as from the time of the cessation of the wrong, negligence, or overt acts complained of, or from the time of the termination of employment.*" (Emphasis supplied.)

In *Burnett v. New York Central Railway,* 380 U. S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965), the Court stated that "The 'basic inquiry' in determining whether the limitation period of sec. 6 is tolled, it said, is whether the congressional purpose is effectuated by tolling the period in given circumstances." The Court concluded that the limitation period is tolled whenever "it effectuates the basic congressional purposes in enacting this humane and remedial (Federal Employers' Liability) Act."

The railroad's petition for certiorari gives the impression that Fletcher was relieved of section work duties on December 7, 1973 by voluntary intervention, which the railroad initiated. This is completely false and in fact, Fletcher's employment status and requests for reassignment to lighter work were rejected. In addition, the railroad challenged his contention that he could not continue

section work by rejecting his application for disability retirement. This occurred in June and July of 1974, the same month that surgery was performed to fuse the fourth and fifth lumbar vertebrae to stabilize his spine.

There is ample evidence in the record of this case to support the ruling by the Eighth Circuit Court of Appeals that Fletcher was assigned on a continuing basis to perform services that were beyond his physical capacities and limitations. The sufficiency of evidence on this issue is not questioned in the defendant railroad's petition for certiorari.

The record in this case contains ample evidence concerning the treatment, medical records and testimony of Dr. Bernard Kratochvil that plaintiff's back problem, pain and disability were brought on by being required on a continuing basis to perform work as a section hand which was beyond his physical capacities. Fletcher's back was seriously debilitated by years of stress and overwork. He had been under treatment for more than a decade for the pain, discomfort and ongoing disability to his back.

Dr. Kratochvil stated in correspondence in February of 1974 (Ex. 25), concerning the medical basis for Fletcher's pain and disability:

> "This is probably brought on by years of heavy work, but I am not aware of any particular accident in this area."

In the petition for certiorari there is no reference to the following facts and sequence of events.

Fletcher was hospitalized on two occasions in April and June 1973 for his chronic back pain and disability.

Fletcher was referred by Dr. Kratochvil in June 1973 to Dr. William Egan, a psychiatrist, for evaluation of his "mental depression". Dr. Egan stated the following on the hospital chart in April of 1973 (Ex. 34):

> ". . . The patient had considerable pain about two or three weeks ago, had a thought of suicide but not actually any intent. He denies any suicidal thought or intent at the present time. He states that he made this comment because he was having so much pain that day. He states that his wife feels that he has a change of personality but states both he and his wife feel it is secondary to the pain. Patient denies ever having an emotional problem. He feels he is basically a good provider when he is pain free. *He is worried about the future because of his back and not knowing how this will affect his work condition.*" (Emphasis supplied.)

In June 1973 when Fletcher was released from the hospital Dr. Kratochvil wrote to the plaintiff's superintendent the following:

> "Because of his back condition I recommend Donald Fletcher be given less strenuous work."

This recommendation was ignored and Fletcher was returned to his work as a section hand. Despite the request for lighter work, Fletcher was required to perform services which in the opinion of his treating orthopedic physician was beyond his physical capacities.

Once again Fletcher was reassigned to perform heavy labor services without any restrictions on weight lifting or physical activities. In December 1973 Fletcher went on a leave of absence status, because he was physically exhausted and unable to continue as a section worker. The argument is made in the petition for certiorari that the

last possible date of injury and the last possible date of alleged tortious acts by the railroad is December 7, 1973. The railroad then argues that Union Pacific should have fired Fletcher rather than grant him a leave of absence, because the employer-employee relationship would have terminated any further right to make a claim. This statement is erroneous and had it been within the power of the Union Pacific Railroad to validly terminate Fletcher's employment, this step surely would have been taken. Fletcher's leave of absence in December 1973 involved the exercise of a right he obtained through his years of service on the railroad, and his rights under his collective bargaining agreement. It certainly was not achieved through altruism on the part of his employer.

The fact is that employees are entitled to sick leave or leave of absence status when their physical condition prevents further participation in their employment. Fletcher was still under treatment by Dr. Kratochvil, was still in pain and was exercising the right to utilize his sick leave. There is no question that if Fletcher was unable to provide medical verification of his ongoing physical problems and disability, the railroad would have served notice on Fletcher that his employment was terminated.

This could not be validly done because he was still under active medical treatment. In February 1974 Fletcher was referred by Dr. Earl Connolly, one of the chief physicians for the Union Pacific Hospital Employees' Association, to Dr. Daniel McKinney for a neurological consultation. Fletcher had not been examined or treated by Dr. Daniel McKinney at any time prior to February 1974. The referral order for this examination

is part of the record in the case and it is noted that Fletcher had been evaluated for mental depression in connection with his back problems. The defendant railroad was still actively involved in making a determination as to Fletcher's employment status and his disability.

Dr. McKinney's report was received in evidence, to-wit Exhibit 7, and stated in part as follows:

> "The patient is probably suffering from a chronic degenerative lumbar intervertebral disc or chronic lumbar strain."

Dr. McKinney's report noted that "this man injured his back in 1962 while scooping rock during his job as a section hand on the railroad."

Additional disability evaluations were performed in June and July 1974 with the conclusion that Fletcher was not disabled and could return to section work.

In June 1974 Fletcher requested that he be placed on a disability status because of his chronic back injury. It was noted in the opinion by Judge McMillian, reported 621 F. 2d 902. On page 905 of the opinion the court stated:

> "In June 1974, the Railroad sent Fletcher to be evaluated for disability. Based solely on X-Rays, these doctors decided that Fletcher was physically sound and rejected him for disability or retirement. Their report was made in early July 1974.
>
> "Coincidentally, in July 1974, Dr. Kratochvil told Fletcher he needed a fusion operation for his 'unstable back'. Dr. Kratochvil testified that Fletcher's pain was precipitated by movement and that the purpose of the fusion operation was to decrease movement in the back and thus decrease the pain."

From these statements it is clear that the railroad still classified Fletcher as a section hand and would have returned him to section work if it were possible to do so.

The Union Pacific doctors concluded on the basis of X-rays that Fletcher was not entitled to a disability classification. Dr. Kratochvil, a Board Certified Orthopedic Surgeon, decided to perform surgery on Fletcher's back in July 1974 which was at the same time that the railroad determined that he was not disabled and not eligible for a disability classification.

Moreover, Dr. Kratochvil testified that the purpose of the surgery performed in July 1974 was to stabilize the low back area. In the surgery which was conducted by Dr. Kratochvil, the fourth and fifth lumbar vertebrae are fused to the sacrum, by means of a transverse process fusion in which a section of bone is removed from the hip and fused to the body of the vertebra (Ex. 34, 62:10-16). The purpose of the operation was to stabilize the back and eliminate the pain.

If the surgery would have been successful, Fletcher presumably would have been reassigned to maintenance of way or section hand activities. It certainly would not be unreasonable for the employee-patient to rely upon the doctor that the surgery being performed would accomplish the objectives that were intended. If the operation worked, Fletcher's back would be "stabilized and free of chronic pain". Fletcher would have no basis for a claim and no valid reason to refuse to return to his employment.

It is respectfully submitted that this point is ignored or glossed over by the petition for certiorari filed herein.

If an employee is still under treatment and being considered for corrective surgery that is intended to solve his medical problems, the statute of limitations surely remains open until the determination can be made on the medical prognosis for the patient.

It is clear also that Dr. Kratochvil viewed Fletcher's employment status in this light since he wrote to the roadmaster for the defendant railroad on April 16, 1975 that:

> "I will not be able to return him to his *present job as a section man.* We would like to get him back to work as soon as another type of work is available." (Emphasis supplied.)

In addition, Dr. Kratochvil wrote another letter on July 23, 1975 stating that:

> "He is being released today for temporary work as a crossing watchman."

In summary, the plaintiff's complaint was filed on June 8, 1977. This was within the three-year statute of limitations and within the time period that the railroad refused to accept Fletcher as a disabled employee. If Dr. Kratochvil had not performed surgery to "stabilize his back" in July 1974 and then kept Fletcher off duty until July 1975, the railroad would have ordered him back to section work. Certainly Fletcher was entitled to find out whether or not the surgery would correct his back problems by stabilizing his back and relieving the pain.

CONCLUSION

For the reasons stated, it is respectfully submitted that the opinion and judgment entered herein by the Eighth Circuit Court of Appeals was and is correct. There exists no valid reason for this Honorable Court to grant the petition for a writ of certiorari.

In the event this Court is inclined to review the questions presented herein, there should be an opportunity for both sides to submit complete briefs, and the case should be assigned for oral argument.

Respectfully submitted,

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